IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

FIRST APPEAL NO.604 OF 1999.

Sou Naina Hemantkumar Mehta : Appellant.

versus

Smt.Sadhanaben Surendra Shah

& ors. : Respondents.

Mr.V.S.Gokhale for the appellant

Mr.R.V.Govilkar for Respondent Nos. 1 to 4.

CORAM : D.G.DESHPANDE,J.

DATED : 21st March 2005.

ORAL ORDER

1. Heard advocates for the appellant and the respondents. This appeal is filed by the original plaintiff against the judgment and order of the IIIrd Jt.Civil Judge, Sr.Division Pune by which her suit for partition was dismissed. The suit came to be filed by the plaintiff in the following background :-

. Surendra Shah was her father and the owner of the suit property. He died on 28th April 1974 leaving behind wife Sadhanaben/Respondent No.1; two daughters Naina - the plaintiff/appellant and Sonal/Respondent No.4; and two sons Sanjay and Ketan - the Respondent Nos. 2 and 3 respectively. According to the plaintiff, all the suit property described in the plaint was the self acquired property and after the death of her father she was entitled to 1/5th share thereof and, therefore, she filed the suit.

2. The trial Court dismissed the suit, though it gave finding that the plaintiff has succeeded in proving that the suit property was the ancestral property. But on Issue No.2 - Whether the plaintiff was entitled for partition, the court gave negative finding. and therefore, this appeal.

3. The entire approach of the trial Court is wrong. The plaintiff has never alleged that the suit property was ancestral property in the hands of her father. Her case was very clear that all

the suit property was self acquired property of her father. The relationship of the plaintiff was admitted by the defendants and there was no dispute to the property that was the subject matter of the suit. Therefore, the court was only required to decide, whether the plaintiff was entitled to any share and, since admittedly Surendra Shah - the father of the plaintiff died intestate, the plaintiff succeed his property along with two brothers, one sister and mother and, was entitled to 1/5th share therein. The suit was very much simple and no evidence was required and the decree should have been followed. The judgment is obviously perverse and is liable to be set aside and quashed.

4. However, the counsel for the respondents contended that the plaintiff will not be entitled to partition of dwelling house as provided under Section 23 of the Hindu Succession Act 1956 till the male heirs i.e. two brothers of the plaintiff chose to divide their respective shares therein. The counsel for the appellant tried to contend that there is no evidence on record to show that as to which of the property was dwelling house. However, in the memo of appeal

and in the title of the suit before the trial Court also the address of the respondents is given as Flat No.2, First floor, Shree Vasupuja Apartments, Pune, Plot No.25 Survey No.17 i.e. the property described in para 1(B) of the plaint. Therefore, the counsel for the respondents contended that this is a dwelling house of the family and, as such, even though the claim of the plaintiff for partition will have to be allowed, that will have to be restricted to other properties. Counsel for the respondents tried to contended that so far as golden jewellery as described in para 1(F) of the plaint is concerned, there is no evidence. But perusal of the written statement of the respondents shows that there is no denial at all. For this fact and in fact there is no parawise reply and the respondents never disputed the existence of jewellery as alleged by the plaintiff in para 1(f). Hence I pass the following order and decree as follows :-

:ORDER:

The appeal is allowed with costs through out.

The Judgment and order of the trial Court dismissing the suit of the plaintiff is set aside. The suit of the plaintiff is decreed as per prayer clause (a).

It is clarified that till respondent Nos. 2 and 3 decide to partition the dwelling house i.e. Flat No.2, First floor, Shree Vasupuja Apartments, Pune, Plot No.25 Survey No.17, the plaintiff will not be entitled to a separate share therein nor she will be entitled to division of the said dwelling house by metes and bounds.

[D.G.DESHPANDE]

21/03/2005 JUDGE.